

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BARBARA J. HELMS, )  
Plaintiff, ) No. CV-07-0358-JPH  
v. ) ORDER GRANTING DEFENDANT'S  
MICHAEL J. ASTRUE, ) MOTION FOR SUMMARY JUDGMENT  
Commissioner of Social )  
Security, )  
Defendant. )

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on June 23, 2008. (Ct. Rec. 14, 16). Plaintiff Barbara J. Helms ("Plaintiff") filed a reply brief on May 28, 2008. (Ct. Rec. 18). Attorney Maureen Rosette represents Plaintiff; Special Assistant United States Attorney Thomas M. Elsberry represents the Commissioner of Social Security ("Commissioner"). The parties have filed a consent to proceed before a magistrate judge. (Ct. Rec. 8). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 16) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 14).

## JURISDICTION

Plaintiff filed an application for Disability Insurance Benefits ("DIB") on May 22, 2000, and an application for Supplemental Security Income ("SSI") benefits on June 13, 2000,

1 alleging disability since April 1, 1995.<sup>1</sup> (AR 71-73, 382-388).  
 2 The applications were denied initially and on reconsideration. An  
 3 administrative hearing was held before Administrative Law Judge  
 4 ("ALJ") Paul L. Gaughen on April 11, 2002. (AR 404-443). On  
 5 November 7, 2002, the ALJ issued a decision finding that Plaintiff  
 6 was not disabled. (AR 19-36). The Appeals Council denied  
 7 Plaintiff's request for review, and Plaintiff proceeded to the  
 8 United States District Court. On July 15, 2004, based upon a  
 9 stipulation of the parties, the matter was remanded for further  
 10 administrative proceedings. (AR 474-475). The Court directed the  
 11 ALJ, on remand, to "properly develop an assessment of Plaintiff's  
 12 residual functional capacity; re-contact Dr. Toews for  
 13 clarification of the formatting error on his report (citing a  
 14 different claimant); obtain a supplemental psychological  
 15 consultative examination; and obtain psychiatric medical expert  
 16 evidence, if necessary." (AR 474).

17 An administrative hearing was held before the ALJ on October  
 18 6, 2005, at which time the ALJ heard testimony from Plaintiff,  
 19 Erika Klossner, medical expert Ronald M. Klein, Ph.D., and  
 20 vocational expert Tom Moreland. (AR 631-676). On January 19,  
 21 2006, the ALJ issued a decision finding that Plaintiff was not  
 22 disabled. (AR 457-467). The ALJ's decision incorporated by  
 23 reference his previous decision in this case. (AR 459). On  
 24 September 26, 2007, the Appeals Council denied Plaintiff's request

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25  
 26 <sup>1</sup>Plaintiff filed subsequent applications for DIB and SSI  
 27 on August 18, 2004, and, based on those applications, it was  
 28 determined that the severity of Plaintiff's pulmonary disease  
 equaled Listing 3.02A, effective August 1, 2004. (AR 457).  
 Therefore, the relevant time period under review is prior to  
 August 1, 2004.

1 for review. (AR 444-447). Therefore, the ALJ's decision became  
 2 the final decision of the Commissioner, which is appealable to the  
 3 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed an  
 4 action for judicial review pursuant to 42 U.S.C. § 405(g) on  
 5 November 6, 2007. (Ct. Rec. 2).

6 **STATEMENT OF FACTS**

7 The facts have been presented in the administrative hearing  
 8 transcripts, the ALJ's decisions, and Plaintiff's brief and will  
 9 only be summarized here. Plaintiff was 49 years old on August 1,  
 10 2004. (AR 464). Plaintiff completed the 11<sup>th</sup> grade and received  
 11 her GED in 1973. (AR 92). Her past work experience includes work  
 12 as a food assembler, kitchen; a cafeteria attendant, combination;  
 13 and a deli clerk/slicer. (AR 662). She alleges disability as of  
 14 April 1, 1995, due to depression, memory and concentration  
 15 problems, possible dyslexia, breathing problems, arthritis in both  
 16 hands, a right foot impairment and pleurisy. (AR 86). Plaintiff  
 17 testified at the administrative hearing held on October 6, 2005,  
 18 that she additionally suffered from symptoms related to hepatitis  
 19 C. (AR 652). Plaintiff also stated that she had regularly  
 20 attended counseling for her psychological symptoms on a weekly  
 21 basis since April of 2002. (AR 652).

22 **SEQUENTIAL EVALUATION PROCESS**

23 The Social Security Act (the "Act") defines "disability" as  
 24 the "inability to engage in any substantial gainful activity by  
 25 reason of any medically determinable physical or mental impairment  
 26 which can be expected to result in death or which has lasted or  
 27 can be expected to last for a continuous period of not less than  
 28 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The

1 Act also provides that a Plaintiff shall be determined to be under  
2 a disability only if his impairments are of such severity that  
3 Plaintiff is not only unable to do his previous work but cannot,  
4 considering Plaintiff's age, education and work experiences,  
5 engage in any other substantial gainful work which exists in the  
6 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
7 Thus, the definition of disability consists of both medical and  
8 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
9 (9<sup>th</sup> Cir. 2001).

10 The Commissioner has established a five-step sequential  
11 evaluation process for determining whether a person is disabled.  
12 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is  
13 engaged in substantial gainful activities. If he is, benefits are  
14 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the  
15 decision maker proceeds to step two, which determines whether  
16 Plaintiff has a medically severe impairment or combination of  
17 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

18 If Plaintiff does not have a severe impairment or combination  
19 of impairments, the disability claim is denied. If the impairment  
20 is severe, the evaluation proceeds to the third step, which  
21 compares Plaintiff's impairment with a number of listed  
22 impairments acknowledged by the Commissioner to be so severe as to  
23 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),  
24 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment  
25 meets or equals one of the listed impairments, Plaintiff is  
26 conclusively presumed to be disabled. If the impairment is not  
27 one conclusively presumed to be disabling, the evaluation proceeds  
28 to the fourth step, which determines whether the impairment

1 prevents Plaintiff from performing work he has performed in the  
2 past. If Plaintiff is able to perform his previous work, he is  
3 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff  
4 cannot perform this work, the fifth and final step in the process  
5 determines whether Plaintiff is able to perform other work in the  
6 national economy in view of his residual functional capacity and  
7 his age, education and past work experience. 20 C.F.R. §§  
8 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

9 The initial burden of proof rests upon Plaintiff to establish  
10 a *prima facie* case of entitlement to disability benefits.

11 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
12 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
13 met once Plaintiff establishes that a physical or mental  
14 impairment prevents him from engaging in his previous occupation.  
15 The burden then shifts to the Commissioner to show (1) that  
16 Plaintiff can perform other substantial gainful activity and (2)  
17 that a "significant number of jobs exist in the national economy"  
18 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498  
19 (9<sup>th</sup> Cir. 1984).

20 **STANDARD OF REVIEW**

21 Congress has provided a limited scope of judicial review of a  
22 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold  
23 the Commissioner's decision, made through an ALJ, when the  
24 determination is not based on legal error and is supported by  
25 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995  
26 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
27 1999). "The [Commissioner's] determination that a plaintiff is  
28 not disabled will be upheld if the findings of fact are supported

1 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
 2 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence  
 3 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
 4 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
 5 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
 6 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
 7 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
 8 evidence as a reasonable mind might accept as adequate to support  
 9 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
 10 (citations omitted). "[S]uch inferences and conclusions as the  
 11 [Commissioner] may reasonably draw from the evidence" will also be  
 12 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
 13 On review, the court considers the record as a whole, not just the  
 14 evidence supporting the decision of the Commissioner. *Weetman v.*  
 15 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
 16 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

17 It is the role of the trier of fact, not this court, to  
 18 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
 19 evidence supports more than one rational interpretation, the court  
 20 may not substitute its judgment for that of the Commissioner.  
 21 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
 22 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
 23 substantial evidence will still be set aside if the proper legal  
 24 standards were not applied in weighing the evidence and making the  
 25 decision. *Brawner v. Secretary of Health and Human Services*, 839  
 26 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). Thus, if there is substantial  
 27 evidence to support the administrative findings, or if there is  
 28 conflicting evidence that will support a finding of either

1 disability or nondisability, the finding of the Commissioner is  
 2 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
 3 1987).

4 **ALJ'S FINDINGS**

5 The ALJ found at step one that Plaintiff has not engaged in  
 6 substantial gainful activity during the relevant time period. (AR  
 7 459). At step two, the ALJ determined that, prior to August 2004,  
 8 Plaintiff had the severe impairments of chronic obstructive  
 9 pulmonary disease, bronchitis with a history of asthma, a  
 10 depressive disorder, NOS, with noted episodes of major depression,  
 11 drug and alcohol addiction, a personality disorder, NOS, and a  
 12 cognitive disorder characterized by seizure-like symptoms. (AR  
 13 460-461). However, without Plaintiff's drug addiction and/or  
 14 alcoholism<sup>2</sup>, the ALJ found that, before August 2004, Plaintiff's  
 15 severe impairments were bronchitis with a history of asthma and  
 16 chronic obstructive pulmonary disease and determined that her  
 17 mental impairments were not severe. (AR 461). The ALJ further  
 18 concluded that, without consideration of Plaintiff's substance  
 19 abuse, Plaintiff did not have an impairment or combination of  
 20 impairments listed in or medically equal to one of the Listings  
 21 impairments. (AR 461).

22 The ALJ found that, prior to August 2004 and without  
 23 consideration of substance abuse, Plaintiff had the residual  
 24 functional capacity ("RFC") to perform medium exertion level work  
 25 with no exposure to fumes and odors. (AR 463). He indicated that  
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27 <sup>2</sup>The ALJ found Plaintiff's substance abuse to be a  
 28 contributing factor material to the determination of disability.  
 (AR 461). Plaintiff does not contest this finding.

1 Plaintiff would need to work in an alcohol-free environment, could  
2 not do complex memory tasks, needed a structured environment, had  
3 poor adaptive skills and decompensated or slowed during adjustment  
4 and could not work in close proximity to others because she would  
5 distract them. (AR 463). She also had slight limitations on  
6 neatness, cleanliness, and accepting criticism and was slow in  
7 learning detailed instructions. (AR 463).

8 At step four of the sequential evaluation process, the ALJ  
9 determined that Plaintiff would not be able to perform her past  
10 relevant work as a food assembler, cafeteria attendant or deli  
11 slicer. (AR 463). However, based on the testimony of the  
12 vocational expert and considering Plaintiff's age, educational  
13 background, work experience and RFC, the ALJ concluded that, prior  
14 to August 2004, Plaintiff was capable of making a successful  
15 adjustment to work that existed in significant numbers in the  
16 national economy. (AR 464-465). Accordingly, the ALJ determined  
17 at step five of the sequential evaluation process that Plaintiff  
18 was not disabled within the meaning of the Social Security Act at  
19 any time prior to August 2004. (AR 465-467).

20 **ISSUES**

21 Plaintiff argues that she was more limited from a  
22 psychological standpoint than as determined by the ALJ. (Ct. Rec.  
23 15 at 14-20). This Court must uphold the Commissioner's  
24 determination that Plaintiff is not disabled if the Commissioner  
25 applied the proper legal standards and there is substantial  
26 evidence in the record as a whole to support the decision.

27     ///

28     ///

## **DISCUSSION**

2 Plaintiff asserts that the ALJ failed to properly evaluate  
3 the medical evidence of record with respect to her mental health,  
4 failed to follow the directives of the remand order, and  
5 improperly rejected the testimony of a lay witness. (Ct. Rec. 15  
6 at 15-20). The Commissioner responds that the ALJ complied with  
7 the remand order, appropriately evaluated the medical evidence of  
8 record and properly rejected the lay testimony of Ms. Klossner.  
9 (Ct. Rec. 19-2 at 7-13).

#### A. Remand Order

11 Plaintiff contends that the ALJ erred by not following the  
12 directives of the Court's July 15, 2004 remand order. (Ct. Rec.  
13 15 at 15-17). On July 15, 2004, based upon a stipulation of the  
14 parties, this case was remanded for further administrative  
15 proceedings. (AR 474-475). The Court directed the ALJ, on  
16 remand, to "properly develop an assessment of Plaintiff's residual  
17 functional capacity; re-contact Dr. Toews for clarification of the  
18 formatting error on his report (citing a different claimant);  
19 obtain a supplemental psychological consultative examination; and  
20 obtain psychiatric medical expert evidence, if necessary." (AR  
21 474).

22 Plaintiff argues that the ALJ deviated from the Court's  
23 remand order by failing to have Dr. Toews rate Plaintiff in work-  
24 related categories and by failing to obtain medical expert  
25 testimony from a psychiatrist. (Ct. Rec. 15 at 17). Deviation  
26 from the Court's remand order in the subsequent administrative  
27 proceedings is itself legal error, subject to reversal on further  
28 judicial review. *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989).

1       The ALJ in this case reevaluated Plaintiff's residual  
2 functional capacity in accord with the remand order. (AR 459-  
3 463). He additionally re-contacted Dr. Toews for clarification of  
4 the formatting error on his report (citing a different claimant).  
5 Dr. Toews responded that the inconsistency identified in his  
6 report was merely a scrivener's error. (AR 611). Dr. Toews  
7 submitted a corrected copy of Plaintiff's consultative evaluation.  
8 (AR 611-616).

9       The ALJ also obtained a supplemental psychological  
10 consultative examination, in accordance with the remand order, as  
11 evidenced by the June 24, 2005 report of Joyce Everhart, Ph.D.  
12 (AR 617-628). Finally, the ALJ obtained supplemental medical  
13 expert testimony from Ronald Klein, Ph.D. (AR 639-651). While  
14 Dr. Klein is not a psychiatrist, the remand order directed the ALJ  
15 to obtain psychiatric medical expert evidence "if necessary." (AR  
16 474). The ALJ was thus given discretion with respect to medical  
17 expert testimony and, apparently, deemed "psychiatric" medical  
18 testimony unnecessary in this case. The ALJ did not act contrary  
19 to the remand order by eliciting testimony from Dr. Klein, a  
20 psychologist.

21       Based on the foregoing, it is apparent that the ALJ properly  
22 followed the directives of the Court's July 15, 2004 remand order.  
23 Plaintiff's argument to the contrary is without merit.

24 **B. Mental Limitations**

25       With respect to Plaintiff's mental health, Plaintiff argues  
26 that the ALJ erroneously relied on a one-time evaluator and the  
27 medical expert over the opinions of Dr. Everhart and Dr. Arnold.  
28 ///

1 (Ct. Rec. 15 at 15-19). The Commissioner responds that the ALJ  
2 properly evaluated the mental health evidence of record. (Ct.  
3 Rec. 19-2).

4 The ALJ found that, prior to August 2004 and without  
5 consideration of substance abuse, Plaintiff would need to work in  
6 an alcohol-free environment, could not do complex memory tasks,  
7 needed a structured environment, had poor adaptive skills and  
8 decompensated or slowed during adjustment, could not work in close  
9 proximity to others because she would distract them, had slight  
10 limitations on neatness, cleanliness, and accepting criticism and  
11 was slow in learning detailed instructions. (AR 463). In making  
12 this determination, the ALJ evaluated the medical evidence of  
13 record pertaining to Plaintiff's mental ability. He also  
14 indicated that his prior decision (AR 19-36) fully described  
15 Plaintiff's impairments and was incorporated by reference and that  
16 the current decision discussed the evidence that had been received  
17 subsequent to that decision and clarified the previous decision.  
18 (AR 459).

19 On August 18, 2000, James E. Bailey, Ph.D., submitted a  
20 report following an evaluation of Plaintiff. (AR 249-253). Dr.  
21 Bailey noted that Plaintiff had a long history of substance abuse  
22 and that Plaintiff reported using heroin two days prior to the  
23 exam. (AR 250). Dr. Bailey indicated that Plaintiff appeared  
24 either high or somewhat groggy during the interview and suggested  
25 an index of either malingering or heroin intoxication. (AR 250).  
26 He indicated that her reported substance abuse was not consistent  
27 with the records in the file, which showed more recent use, and he  
28 generally doubted her credibility. (AR 251). Dr. Bailey

1 diagnosed opioid dependence, continuous, rule out opioid  
2 intoxication, and rule out malingering and determined that other  
3 Axis I diagnoses were not possible, including depression, due to  
4 Plaintiff's continuing substance abuse. (AR 252). He also  
5 diagnosed a mixed personality disorder with narcissistic and  
6 dependent features, and gave a GAF score of 40.<sup>3</sup> (AR 252).

7 Jay M. Toews, Ed.D., evaluated Plaintiff on October 29, 2001.  
8 (AR 612-616). Dr. Toews documented Plaintiff's long history of  
9 substance abuse, primarily heroin, dating back to at least 1996.  
10 (AR 612-613). Although Plaintiff stated she had been clean and  
11 sober for a couple of years, Dr. Toews noted that this statement  
12 contradicted Dr. Bailey's report that Plaintiff had been using  
13 heroin two days prior to her visit with him in August 2000. (AR  
14 613).

15 At the time of the examination, Dr. Toews indicated that  
16 Plaintiff smelled of cannabis, but denied using marijuana. (AR  
17 614). Plaintiff exhibited childlike affect and behavior and gave  
18 immature responses. (AR 614). Dr. Toews noted that there was  
19 significant question regarding malingering and indicated that the  
20 results of the malingering assessment suggested a likelihood that  
21 Plaintiff was deliberately exaggerating her symptoms. (AR 614-  
22 615). Dr. Toews diagnosed malingering, probable, rule out  
23 cannabis abuse, opioid dependence in self reported full remission,  
24 a depressive disorder, NOS, with anxious features, and borderline

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25  
26 <sup>3</sup>A GAF of 40-31 indicates "[s]ome impairment in reality  
27 testing or communication OR major impairment in several areas,  
28 such as work or school, family relations, judgment, thinking,  
or mood." See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32  
(4<sup>th</sup> ed. 1994).

1 intellectual functioning, probable. (AR 616). Dr. Toews also  
2 diagnosed Hepatitis A, B and C, asthma, chronic disease, lack of  
3 primary support and social isolation and gave a GAF score of 50.<sup>4</sup>  
4 (AR 616).

5 Dr. Toews additionally answered interrogatory requests on  
6 September 2, 2002. (AR 378-381). Dr. Toews indicated that his  
7 assignment of a GAF score of 50 reflected Plaintiff's appearance  
8 at the time of the exam, assessment of intellectual functioning,  
9 affective presentation and probable substance abuse. (AR 380).  
10 He indicated that it was his impression that Plaintiff was or had  
11 recently used marijuana at the time of the evaluation. (AR 380).  
12 He further stated that malingering was factored in to the  
13 assessment of the GAF score as malingering "was felt to lead to  
14 grossly exaggerated physical or psychological symptoms." (AR 380-  
15 381).

16 Ronald M. Klein, Ph.D., testified as a medical expert at the  
17 administrative hearing held on October 6, 2005. (AR 639-651).  
18 Dr. Klein indicated that Plaintiff's primary clinical diagnosis  
19 was malingering. (AR 640). He stated that malingering was  
20 referred to repeatedly in the record and was as well supported as  
21 any he had viewed in the past two to three years. (AR 640).

22 While Dr. Klein indicated that he endorsed Dr. Everhart's  
23 diagnosis of malingering (AR 651), he did not understand how Dr.  
24 Everhart opined on a Mental Medical Source Form that Plaintiff had

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25  
26 <sup>4</sup>A GAF of 50-41 reflects: "[s]erious symptoms (e.g.,  
27 suicidal ideation, severe obsessive rituals, frequent  
shoplifting) or any serious impairment in social, occupational,  
or school functioning (e.g., no friends, unable to keep a  
job)." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-IV 32 (4th  
ed. 1994).

1 moderate to marked impairments (AR 641). Dr. Klein speculated  
2 that Dr. Everhart factored out Plaintiff's malingering in deriving  
3 her ratings on the form. (AR 649). He suggested that the ALJ  
4 disregard Dr. Everhart's findings on the Mental Medical Source  
5 Form. (AR 641).

6 Dr. Everhart examined Plaintiff on or about June 24, 2005.  
7 (AR 617-628). Dr. Everhart noted that, inconsistent with the  
8 record, Plaintiff reported she had been mostly drug and alcohol  
9 free for ten years, she had not experimented with any drugs other  
10 than marijuana and pain medication, had used only marijuana and  
11 pain medication, and had been clean and sober for fifteen years.  
12 (AR 620-621, 622). Results of the MMPI-2 suggested exaggeration  
13 of symptoms. (AR 623). Results of the WMS-III did not appear to  
14 be a valid estimate of her current memory functioning and  
15 suggested malingering. (AR 624). A score of six on the Rey 15  
16 Item Visual Memory Test suggested malingering. (AR 625).

17 Dr. Everhard diagnosed a depressive disorder, NOS, with  
18 psychotic features, malingering, a personality disorder, NOS, with  
19 dependent, narcissistic and schizotypal features, opioid  
20 dependence, remission status unknown, and a cognitive disorder,  
21 NOS, by history and record as well as problems with executive  
22 functioning on Trails A and B and gave Plaintiff a Global  
23 Assessment of Functioning ("GAF") score of 45-50. (AR 624-625).  
24 Dr. Everhart marked boxes on a Medical Source Statement of Ability  
25 To Do Work-Related Activities (Mental) form indicating that  
26 Plaintiff had several moderate and marked limitations on her  
27 ability to perform work-related mental activities. (AR 627-628).  
28 ///

1 However, Dr. Everhart also handwrote on the form, "Caution: note  
2 possibility (and diagnosis) of malingering." (AR 627).

3 While Plaintiff contends that the ALJ erred by failing to  
4 provide "proper reasoning for basically rejecting Dr. Everhart's  
5 opinion" (Ct. Rec. 15 at 17), the ALJ did not reject Dr.  
6 Everhart's report. To the contrary, the ALJ's findings are  
7 consistent with Dr. Everhart's narrative opinion which noted  
8 several inconsistencies with Plaintiff's drug use reporting and  
9 diagnosed malingering, a depressive disorder, NOS, a personality  
10 disorder, NOS, a cognitive disorder, NOS, and opioid dependence.  
11 (AR 460-461, 624-625). It is apparent that, as suggested by the  
12 medical expert (AR 641), the ALJ considered Dr. Everhart's check-  
13 box assessment form within the context of her cautionary note  
14 regarding the diagnosed and well supported finding of malingering.

15       Between May 1999 and 2003, John Arnold, Ph.D., also performed  
16 several psychological assessments. (AR 212-215, 216-219, 363-366,  
17 368-377, 544-547, 548-555). As noted by Plaintiff, on all of  
18 these occasions, Dr. Arnold was of the opinion that Plaintiff had  
19 severe mental impairments causing more than slight abnormalities  
20 on her ability to work. (Ct. Rec. 15 at 18). However, while Dr.  
21 Arnold remarked at the initial evaluation about Plaintiff's  
22 extensive drug use history, treatment and relapses, later  
23 evaluations fail to comment on the effects of Plaintiff's drug use  
24 on her functioning ability despite clear record evidence of  
25 continued drug use during that time period.<sup>5</sup> The ALJ discounted

27       <sup>5</sup>Dr. Arnold's final check-box form evaluation, dated August  
28       8, 2003, does, however, indicate that Plaintiff had relapsed  
          three to four times on heroin with the latest relapse three  
          months prior to the August 8, 2003 report. (AR 553).

1 Dr. Arnold's opinions because he did not assess her functioning  
2 given the effects of a substance addiction disorder. (AR 32).

3 The ALJ also found significant that Dr. Arnold noted that  
4 personality testing suggested over-endorsement of psychopathology  
5 but excluded these findings in assessing Plaintiff's psychological  
6 functioning and also suggested that there was a question as to her  
7 motivation and effort in prior formal IQ testing. (AR 32). As  
8 noted above, the diagnosis of malingering is well supported in the  
9 record. *Supra*. Furthermore, the ALJ concluded that Dr. Arnold's  
10 assessments were entitled to less weight because Plaintiff saw him  
11 on these occasions to be evaluated or reevaluated for benefit  
12 eligibility purposes. (AR 462). When a physician is involved in  
13 the application process, thus becoming an advocate for the  
14 claimant, an ALJ is entitled to consider this factor in evaluating  
15 his assessment. *Crane v. Shalala*, 76 F.3d 251, 254 (9<sup>th</sup> Cir.  
16 1996). The ALJ additionally found that the opinions were not well  
17 supported by clinical or laboratory findings. (AR 463). An ALJ  
18 may discredit the opinions of a physician that are unsupported by  
19 objective medical findings. *Tonapetyan v. Halter*, 242 F.3d 1144,  
20 1149 (9<sup>th</sup> Cir. 2001); *Batson v. Barnhart*, 359 F.3d 1190, 1195 (9<sup>th</sup>  
21 Cir. 2004). The ALJ gave specific and legitimate reasons to  
22 discount Dr. Arnold's opinions and, thus, did not err in giving  
23 minimal weight to his assessments.

24 Consistent with the ALJ's determination in this case, the  
25 weight of the record evidence, as described above, demonstrates  
26 that, prior to August 2004, Plaintiff's mental problems would  
27 require Plaintiff to work in an alcohol-free environment, she  
28 could not do complex memory tasks, she would need a structured

1 environment, she would have poor adaptive skills and decompensate  
2 or slow during adjustment, she could not work in close proximity  
3 to others because she would distract them, she would have slight  
4 limitations on neatness, cleanliness, and accepting criticism and  
5 she would be slow in learning detailed instructions. The record  
6 exhibits Plaintiff's long history of drug use. As noted by the  
7 ALJ in both decisions, "Plaintiff's history of illicit drug-  
8 seeking; arrest for welfare fraud and lying to enforcement  
9 officers; exaggeration of symptoms; contradictions in self-  
10 reporting; malingering of psychopathology as well as a diagnosed  
11 factitious neurological disorder totally overshadow her subjective  
12 allegations." (AR 33, 462).

13 The ALJ is responsible for reviewing the evidence and  
14 resolving conflicts or ambiguities. *Magallanes*, 881 F.2d at 751.  
15 If evidence supports more than one rational interpretation, the  
16 Court must uphold the decision of the ALJ. *Allen*, 749 F.2d at  
17 579. It is the role of the trier of fact, not this Court, to  
18 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. The  
19 Court may not substitute its own judgment for that of the ALJ even  
20 if it might justifiably have reached a different result upon de  
21 novo review. 42 U.S.C. § 405(g). The ALJ properly discounted the  
22 assessments of Dr. Arnold, *supra*, and, contrary to Plaintiff's  
23 arguments, the record does not support more restrictive  
24 psychological findings in this case. The ALJ's RFC determination  
25 is in accord with the weight of the record evidence.

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1       **C. Lay Witness Testimony**

2       Plaintiff lastly contends that the ALJ erred by rejecting the  
3       testimony of lay witness Erika Klossner, Plaintiff's counselor  
4       from Family Services Spokane. (Ct. Rec. 15, at 19-20). The ALJ  
5       shall "consider observations by non-medical sources as to how an  
6       impairment affects a claimant's ability to work." *Sprague v.*  
7       *Bowen*, 812 F.2d 1226, 1232 (9<sup>th</sup> Cir. 1987), citing 20 C.F.R. §  
8       404.1513(e)(2). The ALJ may not ignore or improperly reject the  
9       probative testimony of a lay witness without giving reasons that  
10      are germane to each witness. *Dodrill v. Shalala*, 12 F.3d 915, 919  
11      (9<sup>th</sup> Cir. 1993).

12      The ALJ indicated that, while he considered Ms. Klossner's  
13      statements, the record evidence was given more weight. (AR 462).  
14      An ALJ may discount lay testimony that conflicts with medical  
15      evidence. *Lewis v. Apfel*, 236 F.3d 503, 511 (9<sup>th</sup> Cir. 2001). The  
16      ALJ noted that Ms. Klossner also made no distinction as to the  
17      effect of Plaintiff's substance abuse on her mental condition.  
18      (AR 462). In this case, the ALJ found Plaintiff's substance abuse  
19      to be a contributing factor material to the determination of  
20      disability (AR 461), and Plaintiff has not contested this finding.  
21      Although Plaintiff asserts that she was substance free at the time  
22      of Ms. Klossner's testimony, October 6, 2005, and the ALJ did not  
23      ask Ms. Klossner about the effect of Plaintiff's substance abuse  
24      (Ct. Rec. 15 at 19-20), the period at issue in this case is prior  
25      to August 2004 and it is Plaintiff's burden to establish a prima  
26      facie case of disability. *Hoffman v. Heckler*, 785 F.2d 1423, 1425  
27      (9<sup>th</sup> Cir. 1986). The ALJ additionally noted the close  
28      relationship between Plaintiff and Ms. Klossner and the

1 possibility that Ms. Klossner's statements were influenced by her  
2 desire to help Plaintiff. (AR 462). The undersigned finds that  
3 the foregoing reasons provided by the ALJ for rejecting the  
4 statements of Ms. Klossner were acceptable reasons for discounting  
5 her lay witness testimony.

6 **CONCLUSION**

7 Having reviewed the record and the ALJ's conclusions, the  
8 Court finds that the ALJ's decision is supported by substantial  
9 evidence and free of legal error. Plaintiff is thus not disabled  
10 within the meaning of the Social Security Act. Accordingly,

11 **IT IS ORDERED:**

12 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**)  
13 is **DENIED**.

14 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**)  
15 is **GRANTED**.

16 3. The District Court Executive is directed to enter  
17 judgment in favor of Defendant, file this Order, provide a copy to  
18 counsel for Plaintiff and Defendant, and **CLOSE** this file.

19 **IT IS SO ORDERED.**

20 **DATED** this 7<sup>th</sup> day of July, 2008.  
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22 S/James P. Hutton  
23 JAMES P. HUTTON  
UNITED STATES MAGISTRATE JUDGE  
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